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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 251

CLIMATE CONTROL, INC., a corporation, in the right and on behalf of THE INDUSTRIAL COMMISSION OF ARIZONA, and the policyholders of said The Industrial Commission of Arizona,

Plaintiff-Appellant,

vs.

E. F. HILL, F. A. NATHAN, and A. R. KLEINDIENST, individually and as Commissioners of said The Industrial Commission of Arizona, and THE INDUSTRIAL COMMISSION OF ARIZONA,

and

PHELPS DODGE CORPORATION, CASTLE DOME COPPER CO., INC., KENNECOTT COPPER CORPORATION, COPPER CITIES MINING COMPANY, SAN MANUEL COPPER CORPORATION, THE GARRETT CORPORATION, SHATTUCK DENN MINING CORPORATION, THE ARIZONA POWER COMPANY, MAGMA COPPER COMPANY, THE STEARNS ROGER MANUFACTURING COMPANY, INSPIRATION CONSOLIDATED COPPER COMPANY, THE PULLMAN COMPANY, AMERICAN SMELTING AND REFINING COMPANY, MIAMI COPPER COMPANY, APACHE POWDER COMPANY, UPPER VERDE PUBLIC UTILITIES COMPANY, UNITED STATES SMELTING, REFINING AND MINING COMPANY, INTERNATIONAL SMELTING AND REFINING COMPANY, THE EAGLE-PICHER COMPANY, PALMER MANUFACTURING CORPORATION, ST. ANTHONY MINING & DEVELOPMENT COMPANY, LTD., PHELPS DODGE MERCANTILE COMPANY, ALLISON STEEL MFG. COMPANY, REYNOLDS METALS COMPANY, STANDARD OIL COMPANY OF CALIFORNIA, SOUTHWEST LUMBER MILLS COMPANY, UTAH CONSTRUCTION COMPANY, SALT RIVER VALLEY WATER USERS' ASSOCIATION, DARR AERO TECH, INC., SAGINAW & MANISTEE LUMBER COMPANY, VERDE TUNNEL AND SMELTER RAILROAD COMPANY, WESTERN UNION TELEGRAPH COMPANY, FISHER CONTRACTING CO., and MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,

Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

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Plaintiff-Appellant,

vs.

B. F. HILL, F. A. NATHAN, and A. R. KLEINDIENST, individually and as Commissioners of said The Industrial Commission of Arizona; and THE INDUSTRIAL COMMISSION OF ARIZONA;

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PHELPS DODGE CORPORATION; CASTLE DOME COPPER CO., INC.; KENNECOTT COPPER CORPORATION; COPPER CITIES MINING COMPANY; SAN MANUEL COPPER CORPORATION; THE GARRETT CORPORATION; SHATTUCK DENN MINING CORPORATION; THE ARIZONA POWER COMPANY; MAGMA COPPER COMPANY; THE STEARNS ROGER MANUFACTURING COMPANY; INSPIRATION CONSOLIDATED COPPER COMPANY; THE PULLMAN COMPANY; AMERICAN SMELTING AND REFINING COMPANY; MIAMI COPPER COMPANY; APACHE POWDER COMPANY; UPPER VERDE PUBLIC UTILITIES COMPANY; UNITED STATES SMELTING, REFINING AND MINING COMPANY; INTERNATIONAL SMELTING AND REFINING COMPANY; THE EAGLE-PICHER COMPANY; PALMER MANUFACTURING CORPORATION; ST. ANTHONY MINING & DEVELOPMENT COMPANY, LTD.; PHELPS DODGE MERCANTILE COMPANY; ALLISON STEEL MFG. COMPANY; REYNOLDS METALS COMPANY; STANDARD OIL COMPANY OF CALIFORNIA; SOUTHWEST LUMBER MILLS COMPANY; UTAH CONSTRUCTION COMPANY; SALT RIVER VALLEY WATER USERS' ASSOCIATION; DARR AERO TECH, INC.; SAGINAW & MANISTEE LUMBER COMPANY; VERDE TUNNEL AND SMELTER RAILROAD COMPANY; WESTERN UNION TELEGRAPH COMPANY; FISHER CONTRACTING CO., and MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY;

Defendants-Appellees.

No. 251

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ARIZONA

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

We wish to correct at the very outset appellees' statement that appellant's Federal constitutional claims are "hindsighted fabrication" (M. D. 10).[1] Appellant repeatedly urged in the Arizona courts that the construction of the Self-Rating Statute (A. R. S. § 23-983(E)), Plan and Policy urged by the appellees, if adopted, would deprive the general policyholders of their constitutional rights. Thus, in its Statement of Position filed with the Superior Court in the second action, appellant stated:

> "It is Climate Control's unequivocal position that were this statute given the distorted construction required in order to authorize the unprecedented insurance giveaway program that is the self-rater plan as administered, the statute is unconstitutional as constituting a violation of the general class' right to due process" (369).

Appellant further stated in its brief before the Arizona Supreme Court on the original argument:

> "[W]ere the self-rating statute as embodied into the Commission-self rater contract to be construed in such a manner as to permit the self raters to avoid payment of their 'regularly issued' policy rate or rates for basic costs and yet receive like, equal, and identical insurance benefits from all monies raised by the Commission through application to all other policyholders of the rate or rates for basic costs, there would be raised a serious question as to whether such contract was a violation under the federal and state constitutions of the right of all other policyholders to equal protection of the laws and the prohibition against the taking of property without due process" (p. 29).

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[1]The Motion to Dismiss is cited as "M. D." The Jurisdictional Statement is cited as "J. S." Otherwise, citations are as set forth in J. S. 2n. 1.

I

THERE IS NO MERIT IN APPELLEES' UNSUPPORTED STATEMENT THAT THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The first so-called "Argument" of appellees' Motion is entitled: "The Appeal Does Not Present A Substantial Federal Question" (M. D. 8-11). However, appellees have not made in this section or in any other part of their Motion, with the exception of two footnote comments,[2] a single argument addressed to the merits of appellant's constitutional claims.

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[2]In footnote 6, page 4, appellees attempt to convert a deficiency of $412,262.70 in their account in the Catastrophe Reserve during 1948-53 (J. S. 10n. 15) into a surplus of $43,418.10 by failing to charge against the $1,087,724.34 which they paid for basic costs any contribution for administrative expenses. Appellees attempt to justify this omission on the ground that the complaint does not allege that administrative expenses incurred under self-rating policies were the same dollar amount as those incurred under general policies. But the important fact is that, as alleged in the complaint, the Commission actually appropriated for its administrative expense the same percentage (.0931) of all premiums received from the general policyholders *and* the self-raters (22; J. S. 8). In the case of the self-raters the appropriation amounted to $429,199.51 (37; J. S. 10n. 15). The balance of the self-raters' loading charge was not, therefore, sufficient to cover their catastrophe losses (J. S. 10n. 15).

In footnote 7, page 5, appellees contend that the self-raters pay for Employers' Liability Act coverage above $10,000/20,000, because of the alleged fact that self-raters' employers' liability losses are treated as primary or catastrophe losses, as the case may be, under the Self-Rating Plan. Appellees' assertion is an attempt to rebut an allegation of fact in appellant's complaint to the effect that the self-raters do not pay for the unlimited coverage they receive above $10,000/20,000 (128, 265). On appeal to this Court from a state court decision dismissing the complaint, all factual allegations of the complaint are accepted as true. *Postal Telegraph-Cable Co.* v. *City of Newport*, 247 U. S. 464, 474 (1918). The Arizona Supreme Court accepted this factual allegation as correct (J. S. 14a-15a).

The appellees ignore the fact—basic to appellant's challenges of unconstitutionality—that the rates concededly paid by the self-raters and called for under the Self-Rating policy, as construed by the Arizona Supreme Court, were substantially and unreasonably discriminatory against general policyholders (J. S. 8-14, 17-18, 26-29). Nor do appellees even attempt to rebut appellant's contention that the discrimination is not justified by any reasonable distinction between the two classes of policyholders (J. S. 11-13, 27-29).[3] Rather, appellees direct their argument on the merits to two points not in issue on this appeal.[4]

II

THE APPELLANT MAY RAISE ITS FEDERAL CONSTITUTIONAL CHALLENGES EVEN ASSUMING ARGUENDO THAT THE COMMISSION MAY NOT RAISE THEM.

On the erroneous premise that these suits are brought on behalf of the Commission and seek relief solely for the

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[3] In footnote 6, page 4, appellees suggest they are entitled to a lower premium because expense items are lower in the case of larger risks. This emphasizes the arbitrary nature of the discrimination in favor of the self-raters. The case cited by appellees and other authorities show that the size of the premium is the generally accepted measure of the risk. *State Compensation Ins. Fund* v. *McConnell*, 46 Cal. 2d 330, 294 P. 2d 440 (1956); Riesenfeld, *Basic Problems in the Administration of Workmen's Compensation*, 36 MINN. L. REV. 119, 141-42 (1952); Kulp, *The Rate-Making Process in Property and Casualty Insurance*, 15 LAW & CONTEMP. PROB., 493, 518-19 (1950). As alleged in the complaint, there is an extreme spread in the size of premiums paid by the self-raters, e.g., in 1953 self-rater premiums varied from a high of $107,364.35 to a low of $125.00 (37).

[4] Thus appellees assert the Arizona Supreme Court's holding that "the appellees paid the rates called for under the contract" does not present any Federal question (M. D. 10-11). That is not the constitutional issue raised by the Jurisdictional Statement or appellant's application for rehearing (J. S. 8-14, 17-18, 26-29; App. Mem. 31-37).

Appellees argue yet another point not made in the Jurisdictional Statement (although raised on rehearing), namely, that the Self-Rating Statute is invalid because it gives the Commission unbridled discretion as to whether to charge the self-raters anything for basic costs (compare M. D. 11 with J. S. 8-14, 17-18, 26-29; App. Mem. 31-37).

Commission, appellees argue that appellant is precluded from asserting its constitutional claims because the Commission could not assert them (M. D. 8-10). But, as the title and allegations of the complaints in both actions expressly state, appellant is suing in the right and on behalf of the policyholders of the Commission as well as the Commission itself (1, 4, 255, 257); and relief is demanded in both suits on behalf of the general policyholders and the Commission, including a general prayer for such other and further relief as might be deemed proper (53-54, 63-64, 67, 258-60, 262, 264, 266-69).[5] This relief, if granted, would consist of, among other things, a declaration that the Self-Rating Plan is invalid in regard to the computation of the self-raters' basic costs charge and a determination of the rights of general policyholders and self-raters in the Catastrophe Reserve (53, 63, 258, 260, 266-67). Obviously, such relief is sought solely for the benefit of the general policyholders, of which appellant is one.

It is clear beyond question that this appeal presents the issue of whether appellant and other general policyholders have been deprived of their, and not the Commission's, right to equal protection and due process of law under the Fourteenth Amendment.[6]

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[5]The declaratory relief demanded by appellant in the first and second causes of action in both suits and in the fourth cause of action in the second suit is sought on behalf of the general policyholders as well as the Commission (53, 63, 258, 260, 266-69). In the instances where appellant demanded relief solely on behalf of the Commission, it expressly limited its prayer. See, e.g., the monetary relief demanded at (53) and the declaratory relief demanded at (66).

[6]J. S. 2, 4-5, 8-14, 17-18, 24, 26-29; Appellant's Amended Motion for Rehearing in the Arizona Supreme Court 1-2; App. Mem. 31-37.

III

THE APPEAL MAY NOT BE DISMISSED ON THE GROUND THAT THE FEDERAL QUESTIONS WERE NOT RAISED PROPERLY OR IN TIME.

The Arizona Supreme Court did not base its refusal to consider appellant's Federal constitutional points on the ground that they were not raised in time under Arizona practice (J. S. 17a-18a). The court's refusal to consider appellant's constitutional claims was based solely on estoppel and failure to exhaust statutory procedure, neither of which is an adequate state ground for dismissal of this appeal (see pp. 8-17 *infra*). The appellees may not properly argue for dismissal of the appeal on state grounds not relied upon by the state supreme court. *Steele* v. *Louisville & N. R. R.*, 323 U. S. 192, 197 n. 1 (1944); *Grayson* v. *Harris*, 267 U. S. 352, 358 (1925). Moreover, appellees did not even present the question of untimeliness to the Arizona Supreme Court, but rather argued the Federal questions on the merits.[7] See *Great No. Ry.* v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358, 366-67 (1932).

Still further, the fact that the Arizona Supreme Court reviewed on rehearing the merits of appellant's contention based upon the state constitutional doctrine of separation of powers (in regard to the Commission's unlimited discretion whether to charge the self-raters any sum for basic costs) precludes appellees from contending that appellant did not seasonably raise its "kindred" argument that the manner in which the Commission discriminated in favor of the self-raters in charging for basic costs violated the equal protection and due process clauses of the Fourteenth

[7] See Corporate Appellees' Objections to Appellant's Motion and Amended Motion for Rehearing 1-2 and Memorandum in Support thereof 12-17, 21-24.

Amendment (App. Mem. 31-37; J. S. 6-11, 17-18). *Williams* v. *Georgia*, 349 U. S. 375, 383 (1955).[8]

In view of the foregoing, appellant need not rely on the "surprise" doctrine which becomes relevant only when the state court refuses to consider a Federal question, raised for the first time on rehearing, on the ground that it was not timely raised or when, after the appellee argues untimeliness, the state court simply denies rehearing. See *Great No. Ry.* v. *Sunburst Oil & Ref. Co.*, p. 6 *supra*. However, under the facts of the instant case, the "surprise" doctrine would apply since the appellant was not "reasonably bound to anticipate" the Arizona Supreme Court's resolution of the novel issues involved in the construction, for the first time, of the Self-Rating Statute, Policy and Plan.[9]

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[8]Cf. *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23, 24-25 (1931); *Grannis* v. *Ordean*, 234 U. S. 385, 392 (1914) and *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 158 (1911) which held that the Court has jurisdiction of a Federal question raised for the first time in a motion for rehearing when the state court grants rehearing and considers the Federal question.

[9]See J. S. 20-21; cf. *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657, 665 n. 6 (1936) (suggesting that, on almost identical facts, the "surprise doctrine" applies).

The language from the Superior Court decision which appellees claim should have forewarned appellant of the Arizona Supreme Court decision (M. D. 13n. 15) does not deal with the construction of the Self-Rating Policy or Plan or with the issue of whether under ARS 23-983 (E) the Commission has authority to base the self-raters' loading charge on actual primary losses (J. S. 2a-12a).

Contrary to appellees' insinuation (M. D. 13n. 13), *Industrial Commission* v. *Arizona Power Co.*, 37 Ariz. 425, 295 Pac. 305 (1931) could not have forewarned appellant of the Arizona court's construction of the Self-Rating Statute, Plan and Policy inasmuch as the Statute had not yet been enacted (J. S. 2a-3a). The court held in *Arizona Power* that the self-rating policy before it (similar to that presently issued) was *ultra vires* in the absence of an authorizing statute. The computation of the self-raters' loading charge was not at issue. The case of *Herndon* v. *Georgia*, 295 U. S. 441 (1935), cited by appellees (M. D. 12), is clearly distinguishable since there the appellant was forewarned of the allegedly unconstitutional construction of the statute by a previous decision of the highest state court.

IV.

THE ARIZONA SUPREME COURT'S HOLDING OF ESTOPPEL IS NOT AN ADEQUATE STATE GROUND FOR THE JUDGMENT.

Appellees claim the Arizona Supreme Court's decision that appellant was estopped to raise the Federal questions is an adequate state ground for the judgment (M. D. 15-17). When it is urged that a state court decision rests upon a non-Federal ground, this Court will "ascertain for itself, in order that constitutional guarantees may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank* v. *Bryan*, 282 U. S. 765, 772-73 (1931) (state ground held inadequate was, as here, estoppel). In many cases the Court has held that an "estoppel" holding by a state court is not an adequate state ground when it unreasonably infringes on the protection of Federal rights.[10]

Accordingly, it is of first importance to determine exactly what the Arizona Supreme Court's estoppel holding was. The court said:

> "If appellant is asserting that the self-rating statute as construed by the court is unconstitutional, then

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[10]Thus, in the following cases, the Court ruled that a holding of estoppel by a state court was not an adequate ground for a judgment. In *Abie State Bank* v. *Bryan, supra*, the state court held that a bank which was aided in getting deposits by a bank guaranty law was estopped to challenge the law when, at a later time, all assessments thereunder were going to failed banks. In *Frost* v. *Corporation Commission*, 278 U. S. 515 (1929) the state court decided that the holder of a license to operate a cotton gin, received under one section of a statute which required a showing of public convenience, was estopped to challenge a grant made under another section of the same statute without such a showing. In *New York Central RR* v. *New York & Penn. Co.*, 271 U. S. 124 (1926) the state court held that a carrier waived its right not to repay excess charges without the approval of the ICC by its failure to appeal from a state administrative decision determining the overcharge, but not ordering its return. See ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT § 102 at 183-84, § 97 (1951 ed.).

> appellant will not be heard in an attempt to raise such an issue. The rule of law is well established that one who has invoked the provision of a statute, sought to avail himself of its terms, and has been an actor thereunder, may not thereafter question its constitutionality. Haggard v. Industrial Commission, 71 Ariz. 91, 223 P. 2d 915; Stuart v. Norviel, 26 Ariz. 493, 226 P. 908" (J. S. p. 18a).

The Arizona Supreme Court's holding that appellant had "invoked the provisions of a statute" and "sought to avail [itself] . . . of its terms" referred to appellant's contention in the state courts that the Commission was required, under a proper and constitutional construction of A. R. S. § 23-983 (E), the Self-Rating Policy and the Self-Rating Plan, to compute the basic costs contribution of the self-raters in the same manner as that required in the case of general policyholders.[11] This contention was rejected by the Arizona Supreme Court on the merits (J. S. 14-15, 17, 6a, 8a-12a).

In *International Steel & Iron Co.* v. *National Surety Co.*, p. 7 *supra*, this Court passed on the precise question. In rejecting the estoppel defense, the Court said:

> "The respondent insists that as the appellant joined the . . . surety on the refunding bond, as a defendant, it sought to take advantage of the amendatory act of 1929 and is now estopped to question the constitutional validity of the statute . . . . [*Appellant's*] *construction of an act which had not been passed upon by any court was permissible and if, as now appears, the appellant was in error in so construing the act, the mistake cannot be made the basis of an estoppel*. . . . Not until the decision of the Supreme Court was there a holding that the act retroactively affected the enforcibility of the bond. Not until then was there occasion for appellant to urge that, if so construed, the act would impair the obligation of the bond. As we have indicated, the record discloses that

[11] See p. 2 *supra* and p. 14 n. 24 *infra*.

> when this construction of the act appeared probable the appellant promptly raised the constitutional question. *It cannot be estopped so to do by its previous insistence upon a construction which would* render the statute consistent with the Act of 1917 and *present no constitutional difficulty*" (emphasis added) 297 U. S. at 665.

Contrary to appellees' contention (M. D. 16), *International Steel* is not distinguishable on its facts as is evident from the above quotation.

Further, there is no basis for assuming that this Court would have come to a contrary conclusion in *International Steel* if in that case the estoppel issue had been raised and considered in the state court.[12] *International Steel* clearly holds that a party's right to challenge the validity of a state statute under the Federal Constitution would be unreasonably infringed if he were deemed to have waived that right by bringing a suit based on a reasonable and constitutional interpretation of the statute, before it was construed by the state courts.[13]

The Arizona Supreme Court held that appellant, as a general policyholder, was an "actor" under the statute and therefore estopped to attack its constitutionality.[14] If general policyholders are barred from objecting to uncon-

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[12]After rejecting the appellee's estoppel claim in the passage quoted above, the Court pointed out, that the appellee could not rely upon a state law defense not presented in the state courts (citing, at 297 U. S. 666 n. 7, the leading case on this point: *Grayson* v. *Harris*, p. 6 *supra*) without expressly indicating whether it agreed or disagreed with the appellee's assertion that on the facts of the case estoppel could have been an adequate state ground.

[13]In none of the cases cited by appellees at M. D. 15 was a party held estopped to challenge a state statute as construed for the first time in the case before the court on the ground that the suit was brought under the statute, even though the plaintiff argued for a statutory construction which the state courts rejected and which, if adopted, would have rendered the statute constitutional.

[14]Since appellant is a general policyholder it is not an actor under A. R. S. § 23-983(E) which deals only with the authority of the Commission to establish a Self-Rating Plan (J. S. 4, 22, 2a-3a).

stitutional discrimination in favor of self-raters as against general policyholders, then no one can challenge this discrimination.[15] Since the Fund is supported entirely by policyholder premiums (A. R. S. §§ 23-983 (A), 981 (C)), until one becomes a general policyholder he does not have the "injured" or "threatened" "financial interest" that this Court requires a party to have in order to challenge the validity of a state statute under the Federal Constitution. *Doremus* v. *Board of Educ.*, 342 U. S. 429, 435 (1952).[16]

Appellees attempt to avoid the fatal weakness of the Arizona Supreme Court's estoppel holding by contending that the court really intended something entirely different from what it said. Thus they argue that appellant brought its actions on behalf of the Commission and its rights can rise no higher than those of the Commission; and that therefore appellant is estopped to raise the constitutional questions because the Commission would be estopped to raise them (M. D. 16-17). This is not an adequate state ground since, first, the appellant's actions were also brought in behalf of the general policyholders and it is *their* constitutional rights which are being asserted;[17] and, second, appellees' present belated theory of estoppel was never in fact raised, considered, or relied upon in the Arizona courts.[18]

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[15]See cases cited at J. S. 22-23.

[16]Therefore (contrary to appellees assertion, M. D. p. 15), the Arizona Court's estoppel decision does run afoul of the doctrine that Federal law determines "who" may challenge the validity of a state statute under the Federal Constitution. *Allied Stores, Inc.* v. *Bowers*, 358 U. S. 522, 525-26 (1959).

In none of the cases cited by appellees at M. D. 15 did the estoppel doctrine have this effect.

[17]See pp. 4-5 *supra*. The state ground does not therefore meet the requirement that it be "broad" enough to sustain the judgment. *Enterprise Irr. Dist.* v. *Farmers Mut. Canal Co.*, 243 U. S. 157, 164 (1917); *Murdock* v. *Memphis*, 87 U. S. (20 Wall.) 590, 636 (1875); STERN & GRESSMAN, SUPREME COURT PRACTICE 99 (3d ed. 1954).

[18]A state law ground not relied upon by the state supreme court cannot be urged in this Court (authorities cited p. 6 *supra*).

V

THE ARIZONA SUPREME COURT'S HOLDING OF FAILURE TO EXHAUST STATE REMEDIES IS NOT AN ADEQUATE STATE GROUND FOR THE JUDGMENT.

Appellees offer as an adequate state ground for the judgment the holding of the Arizona Supreme Court that:

> "If appellant's constitutional objection is that a statute, even though valid on its face, can be so administered as to be arbitrary and capricious, then the simple answer is that the statute, A. R. S. § 23-946, affords a method for obtaining judicial review of that administrative action. We find nothing unconstitutional in being given a method by which the Commission's orders may be attacked or in being required to pursue that method" (J. S. 18a).

The statutory procedure for judicial review of Commission orders under A. R. S. §23-946[19] cannot possibly give appellant and the general policyholders it represents appropriate relief for the financial losses caused them during 1948-53 by unconstitutional discrimination in favor of the self-raters. An appellant in this Court may not be forced to exhaust a state procedure which is futile, or doubtfully adequate, before its constitutional claims will be heard. *Montana Nat'l Bank* v. *Yellowstone County*, 276 U. S. 499, 505 (1928); *Township of Hillsborough* v. *Cromwell*, 326 U. S. 620, 624-26 (1946).

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[19] A. R. S. §23-946 provides that a party dissatisfied with a Commission order may commence an action in the Superior Court "to set aside, vacate or amend the order, on the ground that the order is unreasonable or unlawful," after the party has petitioned the Commission, under A. R. S. § 23-945, for a hearing on the reasonableness and lawfulness of the order, "and in such petition has raised every issue in the action." A. R. S. § 23-948 provides for an appeal to the Arizona Supreme Court from the Superior Court decision. A. R. S. §§ 23-945 to 948 are set forth in full in M. D. 1a-4a.

A. R. S. § 23-946 limits the jurisdiction of the Superior Court on review of a Commission order to directing that the order be set aside, vacated or amended.[20] The Superior Court in such a proceeding cannot render judgment against the Commission for premiums discriminatorily exacted from the general policyholders or judgment against the self-raters for the amount by which they have been unjustly enriched by the discrimination.[21] In view of this strictly limited power of the Superior Court upon review of a Commission order, appellant and the other general policyholders cannot obtain by resort to the statutory procedure an adequate remedy for the wrong of which they complain.[22]

Even though the estoppel holding of the Arizona Supreme Court is not a state ground adequate to bar the jurisdiction of this Court (see pp. 8-11 *supra*), that holding would be conclusive upon, and would prevent, the Arizona Superior Court from considering appellant's Federal constitutional challenges, if raised in a proceeding under A. R. S. § 23-946. Moreover, the Commission lacks jurisdiction to declare that A. R. S. § 23-983(E), a statute which it is required to administer, is, as construed by the state supreme court and applied by the Commission, invalid

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[20] J.S. 16a, 32a-33a.

[21] The Arizona Supreme Court ruled in its rehearing opinion that the self-raters are not even proper parties to appellant's appeal from the Commission decision under A. R. S. § 23-946 (J.S. 16a).

[22] Appellees try to bolster the adequacy of the procedure under A. R. S. §§ 23-945 and 946 by pointing out that if new rates were set for the self-raters in such a proceeding the Commission could bring a new action against the self-raters to collect them (M. D. 19). In the first place, it is probable that such action would fail, because of res judicata and because, according to appellees, the Commission would be estopped to bring it (J.S. 24-25; M. D. 16-17). Where the existence of the state remedy is uncertain a party need not pursue it before seeking Federal relief. *Township of Hillsborough* v. *Cromwell*, p. 12 *supra*. Moreover, it can hardly be asserted that the A. R. S. §§ 23-945 and 946 procedure is "adequate" if another proceeding is necessary to obtain relief for the violation of rights declared therein.

under the Federal Constitution.[23] Therefore, appellant could not obtain a decision of its constitutional claims in the review proceeding even if there had been no estoppel holding (A. R. S. § 23-946(C)). Thus, in view of the fact that the Arizona Supreme Court rejected on the merits all state law arguments which could have avoided the Federal constitutional issues now raised,[24] the review procedure of A. R. S. § 23-946 does not afford an adequate remedy. *Public Utilities Commission* v. *United States*, 355 U. S. 534, 538-40 (1958); *Montana Nat'l Bank* v. *Yellowstone County*, p. 12 *supra*.

Assuming for purposes of argument that the judicial review procedure could give appellant appropriate and adequate relief, the fact is that appellant has sought to avail itself of that procedure without success. Appellant's first action was based entirely on the discriminatory practices of the Commission favoring self-raters over general policyholders in charging for basic costs during 1948-53. In dismissing this action because of appellant's failure to exhaust its administrative remedy under A. R. S. § 23-945, the Superior Court said:

> "If the ultimate substantive statements of fact and law as set forth in plaintiff's amended complaint be true, appropriate action should be taken to remedy

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[23] See, e.g., *Pressley* v. *Industrial Commission*, 73 Ariz. 22, 31-32, 236 P. 2d 1011, 1017-18 (1951) (Commission has no adjudicatory power beyond that conferred by Workmen's Compensation Act [of which A. R. S. § 23-983(E) is a part] and the provision of the Arizona Constitution authorizing said Act); *West Chandler Farms Co.* v. *Industrial Commission*, 64 Ariz. 383, 392, 173 P. 2d 84, 90 (1946) (". . . . [C]ommission is bound by terms of the compensation law . . . ."); *Industrial Commission* v. *Arizona Power Co.*, p. 7 *supra* at 439, 295 Pac. at 310 ("the commission . . . must proceed and act according to legislative authority as expressed or necessarily implied").

[24] See J. S. 6a, 8a-12a, 14a-15a; Appellant's Statement of Position in the Superior Court in the second action (363-65, 369-72, 377) and Appellant's Brief in the Arizona Supreme Court 16-17, 27-33 (urging the court not to construe the Self-Rating Statute, Plan and Policy so as to sanction the unreasonable and unconstitutional discrimination in favor of the self-raters during 1948-53).

> the situation. In this connection this court takes judicial notice of the fact that plaintiff has filed a verified petition and has been granted a hearing date by the Commission. At that time the substantive charges made by plaintiff should be carefully considered and any necessary corrective measures should be taken" (J. S. 29a-30a).

Appellant then proceeded on its pending petition before the Commission which was based largely on the 1948-53 period (73-75, 96-126, 128-30, 139; J. S. 16 n. 25). The Commission denied relief as to 1948-53 but modified its 1954 rate order (250-53).[25] The fourth cause of action of appellant's second suit sought, among other things, judicial review of the Commission decision (264-69; J. S. 36a). On a motion to dismiss by the self-raters, the Superior Court in its decision limited judicial review to the Commission's 1954 order, and that review is now pending (J. S. 36a). Thus, the appellant is precluded from relief in regard to the crucial 1948-53 period in the pending review proceeding. Having availed itself of the A. R. S. § 23-946 procedure once and been denied a hearing, appellant is not required to resort again to the same procedure before seeking Federal relief. *Smith* v. *Illinois Bell Tele. Co.*, 270 U. S. 587, 590-91 (1926).

Appellees argue that appellant cannot obtain judicial review in regard to the 1948-53 rates because the Superior Court held that appellant's attempt to seek a review under A. R. S. § 23-945 as to those years was not timely, and that this holding was at least impliedly affirmed by the Arizona

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[25] Nowhere in the Commission's findings of fact, conclusions of law or decision is there any indication that appellant was denied relief in regard to 1948-53 because of any statute of limitations or laches. All the Commission's findings and conclusions deal solely with the merits (209-49) and most apply to 1948-53 as well as to later years. See Findings of Fact 1 at 227; 2 at 228; 3 at 231-36; 4 at 236; 5 at 237; 6 at 237-38; 7 at 238-39; 12 at 241-42; 15 at 245; Conclusions of Law 1 at 245; 5 at 247; 7 at 248; 8 at 248-49; 10 at 249; 11 at 249.

Supreme Court (M. D. 18-19). With respect to the judicial review proceeding, it cannot be contended that appellant did not proceed in due time since it commenced that proceeding thirteen days after the Commission decision (209, 255).

Assuming that appellant's proceeding before the Commission under A. R. S. § 23-945 was barred in regard to the 1948-53 period because of untimeliness, that ground is not an adequate basis for the judgment because appellant "could not fairly be deemed to have been apprised of its existence." *NAACP* v. *Alabama ex rel Patterson*, 357 U. S. 449, 457-58 (1958). There is no statutory time limit on a proceeding under A. R. S. § 23-945. Nor has any time limit been judicially imposed, at least prior to the instant case.[26]

When it became apparent that the formula pursuant to which the Commission was charging the self-raters for basic costs was working to the serious disadvantage of the general policyholders, appellant commenced an action with due diligence (4-5; J. S. 9-11). See *Ancient Egyptian Arabic Order* v. *Michaux*, 279 U. S. 737 (1929), where the Court found

[26]In their Arizona Supreme Court brief, the self-raters conceded that there is no specific statutory or judicial time limit applicable to an A. R. S. § 23-945 proceeding (p. 27). The only Arizona authorities appellees cited were quotations from *O'Neill* v. *Industrial Furnaces, Inc.*, 72 Ariz. 149, 150-51, 231 P. 2d 768, 769-70 (1951) and *Holmes* v. *Osborn*, 57 Ariz. 522, 550, 115 P. 2d 775, 787 (1941) (Br. pp. 27-28). In neither of these cases was timeliness an issue. The *Holmes* opinion does not even imply that there is a time limit on filing a petition under A. R. S. § 23-945. In *O'Neill* the court stated that an action for judicial review had been "timely" commenced under what is now A. R. S. § 23-946. In the first place, this dictum did not even extend to the filing of a petition under A. R. S. § 23-945. Moreover, use of the word "timely" in regard to A. R. S. § 23-945, seems to have been overruled by *Industrial Commission* v. *J. & J. Const. Co.*, 72 Ariz. 139, 148-49, 231 P. 2d 762, 768 (1951). The first decision in that case stated that since no "timely" direct attack was made on a Commission order under what is now A. R. S. § 23-946, the order became res judicata. On rehearing, the court modified its opinion to delete the word "timely" and merely state that since the defendant had not directly attacked the order under A. R. S. § 23-945, it was presumed lawful in the proceeding before the court.

that a state court holding in regard to laches was wholly unsupported by the evidence and therefore not an adequate state ground.

CONCLUSION

Appellant's complaints below allege facts showing that during 1948 to 1953 the Commission unreasonably discriminated against the class of general policyholders in favor of thirty-four self-raters and that this discrimination was substantial and unjustified. These facts must be deemed to be true on this appeal (J. S. 5). The Arizona Supreme Court stated that under the constitution, statutes and law of the state, the complaints failed to state a claim upon which relief could be granted, but refused to consider on rehearing whether, in view of the facts alleged in the complaints, its construction and the Commission's application of the statute violated the Federal Constitution (J. S. 6a, 8a-12a, 14a-15a, 17a-18a). The grounds for such refusal are clearly inadequate under controlling decisions of this Court, since they unreasonably preclude the protection of Federal constitutional guarantees. Accordingly, the motion to dismiss should be denied and probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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